IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WAYNE MATTHEW ARCH,
Appellant.

No. 2 CA-CR 2021-0061
Filed May 10, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR202000778
The Honorable Christopher J. O'Neil, Judge

AFFIRMED AS CORRECTED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Rosemary Gordon Pánuco, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Vice Chief Judge Staring and Judge Brearcliffe concurred.

E P P I C H, Presiding Judge:

¶1 After a bench trial, Wayne Arch was convicted of misdemeanor assault, a domestic-violence offense. The trial court suspended the imposition of sentence and placed him on twelve months' probation. On appeal, counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530 (App. 1999), asserting she reviewed the record and was "unable to find any unresolved non-frivolous issue to raise." She asked this court to search the record for reversible error. Arch did not file a supplemental brief.

¶2 While conducting our review pursuant to *Anders*, we identified a potentially non-frivolous claim: whether the trial court had sentenced Arch to a class one misdemeanor, as provided in the sentencing minute entry, but found he had committed a class two misdemeanor by "recklessly" assaulting another person. *See* A.R.S. § 13-1203(A)(1), (B). We thus ordered the parties to file supplemental briefs addressing this issue.

¶3 "Since this is an *Anders* appeal, no issues were preserved . . . ." *State v. Flores*, 227 Ariz. 509, ¶ 12 (App. 2011). We therefore review for fundamental, prejudicial error. *Id.*; *see also State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). Under this standard, the defendant bears the burden of persuasion, but we will not ignore fundamental error if we see it. *State v. Herrera*, 232 Ariz. 536, ¶ 46 (App. 2013). "A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). "If the defendant establishes fundamental error under prongs one or two, he must make a separate showing of prejudice, which also 'involves a fact-intensive inquiry.'" *Id.* (quoting *Henderson*, 210 Ariz. 561, ¶ 26).

¶4 Viewed in the light most favorable to sustaining the verdict, *see State v. Miles*, 211 Ariz. 475, ¶ 2 (App. 2005), the evidence presented at trial establishes that Arch committed assault by recklessly causing physical

injury to another person, *see* A.R.S. §§ 13-105(10)(c), (33), 13-1203(A)(1), 13-3601(A). Arch and G.G. had been dating on and off for several years. One night in March 2020, after drinking with friends, the two had an argument while in Arch's vehicle, and Arch pinned G.G. down with his knees on her back and his hand on her neck, hurting her neck, impeding her breath, and rendering her temporarily unconscious.

¶5 Because the trial court found Arch had acted "recklessly," the offense is a class two misdemeanor. § 13-1203(B). However, the sentencing minute entry—and the trial minute entry—provides that Arch was convicted of a class one misdemeanor.[1] Under A.R.S. § 13-902(A), the maximum probation term for a class two misdemeanor is two years, while that for a class one misdemeanor is three years.

¶6 At sentencing, the parties did not mention the classification of the offense. The state asked the trial court to impose eighteen months' probation, while Arch requested "no more than 12 months" of probation because "this is a misdemeanor." The court stated, "As I indicated at the trial itself, this is a misdemeanor," and "It's very clear that this is a probation case, . . . there's no jail time that is warranted." In considering the length of probation, the court had two concerns: to ensure there was no contact between Arch and G.G. for a reasonable amount of time and to give Arch adequate time to complete his domestic-violence classes and substance-abuse screening. The court concluded, "[I]n keeping with those goals, 12 months appears sufficient."

¶7 In his supplemental brief, Arch argues that the "original sentencing minute entry" had "significant errors," including switching Arch's first and middle names and misclassifying the offense. He therefore "requests that the judgment of sentence be vacated" and that "the case [be] remanded to the trial court for a resentencing." Despite recognizing our standard of review, Arch offers no argument as to whether any error was fundamental or how he was prejudiced. *See State v. Clark*, 249 Ariz. 528, ¶¶ 13-15 (App. 2020) (discussing application of waiver when party fails to argue on appeal that error was fundamental and prejudicial).

¶8 In any event, we agree with the state that Arch cannot establish fundamental, prejudicial error. Assuming, without deciding, that the error in the sentencing minute entry could be characterized as

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[1]The original sentencing minute entry classified Arch's offense as a class four felony. However, the court subsequently corrected the sentencing minute entry, reflecting the offense as a class one misdemeanor.

fundamental, it appears to fall under prong one that "the error went to the foundation of the case." *Escalante*, 245 Ariz. 135, ¶¶ 18, 21 ("An error generally goes to the 'foundation of a case' if it relieves the prosecution of its burden to prove a crime's elements . . . ."). That prong requires Arch to establish prejudice. *Id.* ¶ 21.

¶9 The trial court imposed a twelve-month probationary term, which was less than the maximum allowed for both a class one and a class two misdemeanor.[2] *See* § 13-902(A)(5), (6). In determining the term, the court focused on Arch's need to refrain from contacting G.G. and to complete domestic-violence classes and a substance-abuse screening. It determined that twelve months would be "sufficient" for these goals. Thus, the court's erroneous characterization of the offense as a class one misdemeanor in the sentencing minute entry did not affect its determination that a twelve-month term of probation was appropriate. Consequently, a remand for resentencing is not required. *See State v. Ramsey*, 211 Ariz. 529, n.7 (App. 2005) (defendant not entitled to resentencing where "record clearly shows the trial court would have reached the same result," absent consideration of arguably improper factor (quoting *State v. Ojeda*, 159 Ariz. 560, 562 (1989))); *cf. State v. Cox*, 201 Ariz. 464, ¶ 14 (App. 2002) (remanding for resentencing where trial court indicated it wanted to impose different sentence but erroneously thought it could not do so).

¶10 Although resentencing is unnecessary, we correct the trial court's sentencing minute entry to reflect that Arch's assault conviction is a class two misdemeanor. *See State v. Ovante*, 231 Ariz. 180, ¶ 38 (2013) (ordering minute entry corrected where record clearly identifies intended sentence). This is consistent with the court's oral finding of recklessness at trial. *See id.* (when discrepancy between trial court's oral pronouncement and written minute entry can be clearly resolved by looking at record, oral pronouncement in open court controls over minute entry).

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[2]Indeed, twelve months' probation was what Arch had requested the trial court impose. Although this request could arguably be interpreted as an invitation of error, we decline to apply the doctrine here, where there was no express discussion of the classification of the offense. *See State v. Lucero*, 223 Ariz. 129, ¶ 18 (App. 2009) (invited error doctrine prevents court from correcting error that might go to foundation of case and cause prejudice to defendant, but extreme caution must be exercised in application).

¶11 Pursuant to our obligation under *Anders*, we have searched the record for reversible error and have found a discrepancy in the trial court's sentencing minute entry. Accordingly, we affirm Arch's conviction and probationary term as corrected.